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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TRUDY GILBERT,

Plaintiff and Appellant,

v.

JULIE ROBERTS,

Defendant and Respondent.

2d Civil No. B245346
(Super. Ct. No. 56-2011-
395617-CU-FR-VTA)
(Ventura County)

Government Code section 822.2 provides that a public employee acting within the scope of her duties is not liable for a negligent or intentional misrepresentation unless the misrepresentation was made with "actual malice."¹ The trial court granted defendant summary judgment because the undisputed evidence showed there was no actual malice. We affirm.

FACTS

FIRST AMENDED COMPLAINT

Julie Roberts is a manager in the Ventura County Behavioral Health Department (County). In January 2009, Roberts interviewed Trudy Gilbert for a job with the County.

¹ All statutory references are to the Government Code unless otherwise stated.

Gilbert, who has a "Ph.D." in psychology, resided in Arkansas and maintained a private practice there. During the job interview with Roberts, Gilbert expressed concern about uprooting her life in Arkansas to take a job in California. Gilbert worried that she could be fired without cause during her probationary period. According to Gilbert, Roberts replied substantially as follows: "If your performance meets our standards, you will not be terminated during the probation period. If some areas of your performance are below the standards and we feel that you can improve, your probation may be extended and you will be given an opportunity to improve your performance."

Gilbert alleges that Roberts intended that she rely on the promise and that she did rely. She claims Roberts knew her statement was false. In fact, County policy was that an employee could be terminated during her probationary period without a valid reason, and that the probationary period would not be extended.

Gilbert further alleges that Roberts did not perform her promise. Specifically, even though Gilbert's performance met the County's standards, she was terminated without a valid reason during her probationary period. Her probationary period was not extended so that she could improve her performance.

MOTION FOR SUMMARY JUDGMENT

(A.) Roberts's Declaration

Roberts declared that she interviewed Gilbert for a position with one of the County's programs. At the end of the interview, Roberts decided to offer Gilbert the job. Roberts declared she never said anything she believed to be false, or that was intended to deceive Gilbert or cause her harm.

Gilbert was required to serve a one-year probationary period before gaining permanent status under the County's civil service rules. During the probationary period, good cause is not required to dismiss an employee and the employee has no right to appeal. But it is the County's practice, as well as Roberts's own practice, not to dismiss a probationary employee without a reason.

Roberts's interaction with Gilbert was limited during the first 90 days of Gilbert's employment. Based on that interaction, as well as comments from other supervisors, Roberts gave Gilbert a satisfactory 90-day performance appraisal.

Almost immediately after the 90-day performance appraisal, Roberts began to notice changes in Gilbert's behavior. Gilbert seemed "disengaged" and no longer participated in staff meetings. During this time, Roberts learned Gilbert was having unauthorized contact with clients.

Matters came to a head on Friday, September 3, 2010. Roberts assigned Gilbert a project. The project was not urgent. Roberts also assigned Gilbert to relieve another employee, Susan Speer, at the mental health clinic at 12:30 p.m. that day. Accordingly, Roberts instructed Gilbert to take her lunch break at 11:30 a.m.

At approximately 12:35 p.m., Speer called Roberts. Speer said Gilbert was refusing to relieve her, claiming she had to complete a very important assignment for Roberts. Roberts told Gilbert to go to lunch immediately and to relieve Speer immediately thereafter. Gilbert did not comply. Finally, at 2:30 p.m., Roberts again ordered Gilbert to relieve Speer.

As Roberts was leaving work for the day, Gilbert appeared outside her office. She wanted to talk about the events that occurred earlier that day. Roberts told her she did not want to discuss it now. Gilbert persisted and refused to leave. She followed Roberts out of the building trying to explain. She ignored Roberts's direction to stop trying to explain. Gilbert appeared agitated and moved within a foot of Roberts. Eventually, another employee interceded and Gilbert left. Gilbert's behavior caused Roberts to fear for her safety. Roberts determined Gilbert should be dismissed from her employment.

(B.) Gilbert's Declaration

Gilbert declared that in her employment interview on January 29, 2010, Roberts told her: "[I]f my performance met [County] standards, I would not be terminated during the probationary period. She also told me that if some areas of my performance were below the standards and [the County] felt that I could improve, my

probation would be extended and I would be given an opportunity to improve my performance."

It was clear to Gilbert that Roberts had no power to fire her during the probationary period without a valid reason. Had Roberts told her she did not fire people during the probationary period without a valid reason even though she had the power to do so, Gilbert would not have accepted the job. Gilbert relied on Roberts's representations and took the job.

In June 2010 Gilbert purchased a townhome in Oxnard. Roberts helped her in the final inspection. During the inspection, Roberts again assured her that the worst thing that could happen in Gilbert's employment is that the probationary period would be extended.

In August 2011 Gilbert met with Roberts to discuss Gilbert's 90-day evaluation. Roberts praised Gilbert's performance "in the most flattering terms." Again, Roberts informed her that if her performance changes her probation will be extended. Gilbert disputed Roberts's statement that her performance evaluation was based on limited interactions. Gilbert claims she had numerous interactions with Roberts both during and off work. Roberts even planned a housewarming party at Gilbert's townhome. Gilbert denied she had any unauthorized client contact.

Gilbert declared, "My relationship and interactions with Julie Roberts were warm, fantastic and friendly until late August 2010." At a staff meeting Gilbert disagreed with Roberts's assessment of a client. Gilbert claimed that ever since that day, Roberts "became distant and unfriendly to me."

Gilbert denied that there was "something close to a physical confrontation" between herself and Roberts. She did not raise her voice or get close to Roberts as Roberts described in her declaration.

The trial court granted Roberts's motion for summary judgment pursuant to section 822.12. The court concluded Roberts carried her burden of showing undisputed evidence she did not act with actual malice. That shifted the burden to Gilbert to raise a triable issue of material fact. Gilbert failed to carry that burden.

DISCUSSION

I.

Summary judgment is granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such inferences are contradicted by other inferences or evidence that raise a triable issue of fact. (*Ibid.*) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

The moving party has the initial burden of showing that one or more elements of a cause of action cannot be established. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Where the moving party has carried that burden, the burden shifts to the opposing party to show a triable issue of material fact. (*Ibid.*) Our review of the trial court's grant of the motion is de novo. (*Id.* at p. 767.)

II.

Section 822.2 provides: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice."

The immunity afforded by section 822.2 applies unless, in addition to the essentials of common law deceit, a public employee is motivated by corruption or actual malice. (*Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 649.)

Gilbert cites *Downey Venture v. LMI Insurance Company* (1998) 66 Cal.App.4th 478, 494, for the proposition that the element of malice can be satisfied by a showing of "indifference." Gilbert argues that at a minimum, the evidence shows the

misrepresentations were made with indifference. *Downey* made the statement in the context of a malicious prosecution action. It did not involve section 822.2.

Downey does not elaborate on "indifference" except to give an example. The example *Downey* gives is *Bertero v. National General Corporation* (1974) 13 Cal.3d 43, 54, where an attorney admitted arguing a weak point "' . . . because I wanted to show the Appellate Court what a bastard Bertero was.'" That sounds more like open hostility than indifference.

In any event, given that section 822.2 provides immunity for even intentional misrepresentations, it would be anomalous to construe the section as allowing a cause of action for a misrepresentation made with indifference. Instead, we apply the general rule that the words of a statute are given their usual and ordinary meaning. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 783.) The usual and ordinary meaning of the word "malice" is "a desire to harm others or to see others suffer." (*American Heritage Dict.* (2d College ed. 192, 1985) p. 759.)

Here Roberts declared she never told Gilbert anything she believed to be false, or that was intended to deceive her or cause her harm. In addition to Roberts's direct declaration of her state of mind, the circumstances show Roberts harbored no malice toward Gilbert. The alleged misrepresentations were made in the context of offering Gilbert employment. That is not an action associated with malice. In her 90-day employee performance evaluation, Roberts praised Gilbert's performance. Moreover, all the misrepresentations were alleged to have been made prior to late August 2010. Gilbert herself described her interactions with Roberts until late August 2010 as "warm, fantastic and friendly." It is hard to think of a description less consistent with malice.

Nothing in Gilbert's declaration contradicts Roberts's showing of a lack of malice. If anything, Gilbert's declaration supports Roberts by painting a picture of a warm and friendly relationship until after Roberts allegedly made the misrepresentations.

In addition, Gilbert's answers to Roberts's interrogatories show a complete lack of evidence of malice. Roberts's asked Gilbert to state all facts on which she based her contention that Roberts acted with corruption or malice. Gilbert replied: "Julie

Roberts knew that she was making a false promise and that the information that I would not be terminated during the probationary period without a valid reason and/or extension of probation was false."

Gilbert's answer is a mere conclusion stating no evidentiary facts. Moreover, the answer states nothing more than that Roberts made intentional misrepresentations. Without more section 822.2 provides a public employee immunity for intentional misrepresentations. But liability attaches when a representation is made with the intent for a person to alter his or her position to his or her injury or risk. (See *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401, 408, disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.)

Gilbert argues there are triable issues of fact on whether she had unauthorized client contact and whether the parties' relationship changed when she disagreed with Roberts in late August 2010. But these are not material issues of fact. It is undisputed that Roberts did not learn of the alleged unauthorized client contact until after the alleged misrepresentations were made. In addition, all of the alleged misrepresentations were made prior to the late August meeting.

Gilbert argues there is a factual issue regarding the scope of Gilbert's and Roberts's relationship. Gilbert claims the facts are relevant to provide context to any inferences about their ability to communicate and the reasonableness of Gilbert's reliance on Roberts's misrepresentations. But the ability of the parties to communicate and the reasonableness of Gilbert's reliance are not the issues here. The issue here is whether Roberts acted with malice. Roberts declared that she did not have much contact with Gilbert. Gilbert described their relationship as "warm, fantastic and friendly." Neither view of the relationship points to malice.

Similarly, it is not material that the parties have different versions of the events that led to the termination of Gilbert's employment. It is undisputed that the parties were on good terms at the time the alleged misrepresentations were made. Whatever happened thereafter is not material.

III.

Gilbert contends the trial court abused its discretion when it admitted into evidence Roberts's declaration of her own state of mind.

Roberts declared, "I never said anything to [Gilbert] that I believed to be false and I never said or did anything that was intended to deceive her or cause her harm."

Code of Civil Procedure section 473c, subdivision (e) gives the trial court the discretion to deny a motion for summary judgment "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established *solely* by the individual's affirmation thereof." (Italics added.)

But, as we have previously pointed out, Roberts's declaration of her own state of mind is not the sole evidence of her lack of malice. The circumstances under which the alleged misrepresentations were made also constitutes evidence of lack of malice.

Even if Code of Civil Procedure section 473c, subdivision (e) applies, Gilbert has shown no abuse of discretion. Gilbert argues that Roberts's declaration of her state of mind is stated in the negative. That is, of course, because Roberts had the initial burden of producing evidence of a negative, that she did not have a malicious state of mind. Nor does Gilbert cite any authority to support the proposition that a person's declaration of her state of mind must be stated in the affirmative.

Gilbert relies on two cases in which the trial court's exercise of discretion to deny summary judgment based on Code of Civil Procedure section 473c, subdivision (e) was upheld on appeal. (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1046; *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031.)

Far from supporting Gilbert's claim of abuse of discretion, the cases on which she relies demonstrate that absent a clear showing of abuse, the trial court's exercise of discretion will be upheld on appeal. Gilbert makes no such showing.

We uphold the trial court's exercise of discretion to consider Roberts's declaration of her state of mind.

The judgment is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Frederick H. Bysshe, Judge
Superior Court County of Ventura

Khiterer & Park, Vladi Khiterer, Mark H. Cheung for Plaintiff and
Appellant.

Leroy Smith, County Counsel, County of Ventura, Matthew A. Smith,
Assistant County Counsel for Defendant and Respondent.